

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA 32/23

In the matter between:

WORKFORCE STAFFING (PTY) LTD

Appellant

and

SIYABULELA L MJOLI

First Respondent

SABELO S MBATHA

Second Respondent

Heard: 7 March 2024

Delivered: 11 April 2024

Coram: Molahlehi AJP, Savage ADJP et Van Niekerk JA

JUDGMENT

Van Niekerk JA

Introduction

[1] This is an appeal, with the leave of this Court, against the whole of the judgment delivered by the Labour Court on 17 January 2022. In its judgment, the Labour Court held that the dismissal of the respondents in these proceedings (the employees) was substantively and procedurally unfair, and ordered that they be reinstated, with retrospective effect.

Factual background

- [2] In their statement of claim, the employees contended that they were permanent employees of the appellant until their dismissal on 23 March 2018. The employees averred that the appellant had prior to the termination of their employment failed to comply with section 189 of the Labour Relations Act¹ (LRA), and that their dismissals were thus substantively and procedurally unfair. In its statement of response, the appellant averred that the employees were engaged on fixed-term contracts and that on 23 March 2018, they had signed what it referred to as “separation agreements” in terms of which the employees agreed that their employment would terminate by mutual consent. The appellant thus denied the existence of a dismissal.
- [3] It was not in dispute that the appellant is a temporary employment service as defined by section 198 of the LRA, and that the employees’ services were placed at the disposal of the appellant’s client, Rema Tip Top. In terms of the pre-trial minutes, the Court was required to determine whether the employees were permanent employees of the appellant, whether they signed separation agreements on 23 March 2018 and if so, whether section 189 was applicable.
- [4] Both employees testified at the trial. The first respondent was employed by the appellant in December 2016; the second respondent in November 2017. The employees testified that on 23 March 2018, the appellant’s manager, Mr Gordon Panman, informed them that Rema Tip Top had no work on account of a change in its structures, that they should hand in their uniforms and boots and go to the appellant’s Benoni branch on 26 March 2018 to collect papers with the relevant information. The first respondent explained that he could not attend at the Benoni branch on 26 March 2018 because he had to attend to his mother who was ill in KwaZulu-Natal (KZN); the second respondent waited until the first respondent was available so that they could go to Benoni together. The employees ultimately presented themselves at the Benoni branch on 12 April 2018 where they sought some confirmation in writing to indicate their employment status. They were

¹ Act 66 of 1995, as amended.

given letters signed by Ms Precious Zulu stating that their employment contracts with the appellant had terminated on 25 March 2018 and that they had not been reinstated afterwards. The employees testified that they were surprised at this since they regarded themselves as permanent employees of the appellant and expected to be placed with another of the appellant's clients.

- [5] Both employees testified that they had not been given notice or consulted in terms of section 189 of the LRA and that they sought a declaration that their dismissals were unfair.
- [6] The disputed separation agreements were put to each of the employees during the examination-in-chief. On the face of the document, the first respondent was identified as "the employee", and the document was signed by "the employer" and "the employee". The first respondent denied that it was his signature that appeared on the agreement. He also denied ever having signed a separation agreement. The second respondent also denied that the signature on the agreement presented to him and on which his name was recorded was his signature, and stated *"I can't remember signing this document"*.
- [7] It is not in dispute that on 23 October 2022, some four and a half years after the date on which the employees were alleged to have signed the separation agreements, the employees deposed to affidavits at the SAPS Hillbrow, each stating that the signature that appears on the separation agreement is not his signature and that he did not sign any separation agreement.
- [8] The appellant's manager, Mr Tebogo Moalusi, testified that the employees had been engaged on fixed-term contracts and placed on the Rema Tip Top site. When Rema lost Eskom Kusile as a client, it shut down its site and no longer required the appellant's services. The appellant entered into agreements with the affected staff in terms of which their employment would be terminated by mutual consent, and on the basis that the appellant would seek to place them on other

sites. Mr Gordon Panman managed the process. Moalusi testified that he prepared the agreements. Panman was to discuss them with affected employees and return any signed agreements to him. Moalusi stated that the appellant had not embarked on a retrenchment process in terms of section 189 on account of the fact that all of the affected workers (some 22 of them) signed mutual separation agreements. In the event that they had not done so, the appellant would have initiated a consultation process in terms of section 189.

- [9] Panman testified that he met with the appellant's employees potentially affected by Rema's decision to shut down on Monday, 19 March 2018 and distributed a draft mutual separation agreement. He advised employees that he would return on Friday, 23 March 2018 to discuss the agreements on which the employees could raise any concerns with him. The draft agreement was given to each employee personally. On 23 March 2018, Panman testified that he met with each employee on an individual basis when the agreements were discussed. Panman stated that he responded to any questions raised and that most of the employees stated that they understood the separation agreement, signed it and handed it to Panman. He stated that some of the employees inquired about the prospects of employment on another site; he advised them that they would be contacted and placed if that was possible. Assignees placed on different sites would be required to sign new contracts of employment. Under cross-examination, Panman conceded that no witnesses had signed the agreements as provided on the *pro forma* document but he was adamant that none of the signatories had been forced to sign the agreement, and that the employees had both signed the agreement, in his presence. Employees were requested to go to the Benoni branch on Monday 26 March 2018 for assistance with Curricula Vitae (CVs) and placement at other sites.

The Labour Court judgment

- [10] The Labour Court dealt first with the issue of the nature of the employees' employment. The Court recorded the first respondent's evidence that he was

employed on a permanent basis and that he had not signed the fixed-term contract that was put to him as the basis of his employment. The Court found that the first respondent's "*last minute somersault in distancing himself from the fixed-term contract unconvincing*". Despite the denial of his signature on the fixed-term contract presented to him, the Court specifically rejected the first respondent's evidence that he had not signed the fixed-term contract, and held that the first respondent had indeed signed the contract and had thus been employed by the appellant on a fixed-term basis. A similar finding was made in respect of the second respondent.

[11] In relation to the separation agreements, the Labour Court recognised that it was faced with two mutually destructive versions. Panman had testified that each of the employees had signed the separation agreements in his presence; the employees denied that the signatures affixed to the agreements were their signatures.

[12] Appealing to *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others*², the Labour Court proceeded to make credibility findings. In its assessment of the evidence, the Court recorded that the agreements were not signed by any witnesses who could verify the employees' signatures. The Court found that the inconsistencies and contradictions in the evidence adduced by the employees were not material. The employees' evidence regarding events on 23 March 2018 and in particular that there was no consultation on the Rema branch closing down and their having to attend the Benoni branch to collect letters, was consistent, and thus more probable.

[13] Turning to the evidence proffered by the appellant, the Court found that Panman's evidence that at a first consultation meeting on 19 March 2018 employees had been handed draft agreements and that at a second consultation meeting on 23 March 2018, each employee signed the disputed agreement in his

² 2003 (1) SA 11 (SCA); [2002] ZASCA 98.

presence, contradicted paragraph 1.5 of the pre-trial minutes. That paragraph records, in response to the standard question regarding the detail of meetings and consultations held in relation to a dispute about dismissal for operational requirements, the appellant's response that "*consultation was conducted prior to the signature of the separation agreements*". The contradiction identified by the Court was between Panman's evidence that two "consultations" were held (one on 19 March, the second on 23 March 2018) and the pre-trial minutes, which recorded that one consultation was held.

- [14] The Labour Court found the employees' evidence to be consistent "*in relation to events of 23 March 2018 as that no consultation having taken place in respect of the Rema branch closing down and having to attend at the Benoni branch to collect documents, which turned out to be confirmation of employment letters*". The Court concluded:³

'... I find their version more probable and accordingly that no separation agreements were concluded by them on 23 March 2018. Had they signed the agreements, there would be no reason for them to attend at the respondent's office to be reassigned [sic]. On the respondent's own version, the reason their employment was terminated is because they were in breach of clause 3.8 – failing to attend to be re-assigned. It is improbable that the contracts would be terminated for this reason, only for the applicants to be required to return to report to be re-assigned. This is simply a case of a dog chasing its own tail.'

- [15] And further, at paragraph 46:

'I find that the version of the separation agreements being concluded is a fabrication by the respondent, to escape the consequences of being found to have disregarded the provisions of section 189 of the LRA. One does

³ At paragraph 45 of the judgment.

not have to look very far. The ruling by the CCMA of 9 July 2018 states that, on the version of Mr. Maolusi, the retrenchment process of the applicant was in terms of section 189 of the LRA. The ruling states:

‘Mr. Tebego Maolusi, HR for the respondent [stated] that the applicants was [sic] part of 30 other employees who went through a s189 [dismissal] at Rema Tip Top, one of the respondent’s clients that shut down...’

[16] On this basis, the Labour Court found that Maolusi was a dishonest witness and rejected his version.

[17] Finally, the Labour Court noted that the confirmation letters given to the employees on 12 April 2018 record that the employees’ contracts ended on 25 April 2018. The court went on to conclude that *“In my view, if mutual separation agreements were concluded on 23 April 2018 with this date being the last date of service as recorded in the agreement, then the letter of confirmation would have stated that the contract terminated on 23 April 2018”*.⁴

[18] The Court found that the separation agreements were a fabrication and that the employees had been dismissed in circumstances where the appellant had failed to comply with the provisions of section 189. The employees were thus entitled to be reinstated with retrospective effect, to be placed with another of the appellant’s clients.

Applicable legal principles

[19] Section 192 of the LRA, requires that in any unfair dismissal proceedings, the employee must establish the existence of the dismissal; the employer must then prove that the dismissal is fair.

⁴ At paragraph 47 of the judgment.

- [20] The use of the word “must” indicates that the section is peremptory – an employee claiming to have been unfairly dismissed is required to prove, on a balance of probabilities, that the employment relationship was terminated in one of the ways contemplated by section 186 or section 198A (4). If the existence of a dismissal is in dispute, an arbitrator or trial court must necessarily engage in a qualitative assessment of the evidence to determine which of the competing versions is the more probable. If the employee fails to discharge the onus of proving a dismissal, the referral stands to be dismissed on that account – there is no enquiry into the allegations of unfairness made against the employer.
- [21] The employees do not dispute that they bear the onus to prove, on a balance of probabilities, the existence of the dismissals which they assert.

Analysis

- [22] The pleadings and the pre-trial minutes make it clear that although the dispute before the Court concerned on an alleged unfair dismissal for reasons related to the appellant’s operational requirements, the preliminary and primary issue that the Court was required to decide was whether the employer had dismissed the employees. This in turn raised the issue of whether the employees had signed the separation agreements. It was only in the event of a finding that the employees were dismissed that the reason for and fairness of any dismissal became relevant. This much was acknowledged by the employees’ representative, who stated in his opening address that the employees’ allegations of unfair dismissal “*are premised on the basis that they have not signed any separation agreement...*”. The Court’s departure point ought therefore to have been an enquiry into the existence of a dismissal, and an application of the onus on the employees to adduce evidence to establish, on a balance of probabilities that they had been dismissed as contemplated by the definition of “dismissal” in section 186(1).

[23] Given the material dispute of fact that was served before it, the Labour Court was required to resolve that dispute. It did so only by reference to the credibility analysis in which it engaged, and after finding that the appellant's witnesses were not credible and that indeed, in Panman's case, had been dishonest.

[24] In undertaking its credibility analysis, the Court lost sight of the necessity of considering the underlying probabilities. In *National Employers' General Insurance Co Ltd v Jagers*⁵, Eksteen AJP observed:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance or probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

⁵ 1984 (4) SA 437 (E); [1984] 4 All SA 622 (E) at 440D-441A.

It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.'

- [25] Although an appeal Court will ordinarily be reluctant to disturb credibility findings made by a trial court, this is not an immutable rule. In *Allie v Foodworld Stores Distribution Centre (Pty) Ltd and others*⁶ the SCA (per Navsa JA) said the following:

'Of course, the judicial officer, who has sight of the witnesses and is able to assess the evidence from nearby, is the best person to gauge their demeanour. The record of such evidence, however, speaks for itself. If the witness is mendacious, contradictory or evasive, this will appear from the record. And if the judicial officer has justified criticism of a witness or of his or her evidence, the justification for such criticism will normally also appear from the record. Even more so will this be the case when a credibility finding is made against a particular witness. Although a Court of appeal is reluctant to interfere with credibility findings made by the court of first instance, it is not obliged to accept such findings if they should not appear to be justified.'

- [26] In my view, there is no basis for the adverse credibility findings made by the Labour Court both in respect of Maolusi and Panman, and the conclusions drawn by the Court on the basis of its credibility findings have no basis. Secondly, and in any event, the probabilities favour the appellant's version that the employees

⁶ 2004 (2) SA 433 (SCA); [2004] 1 All SA 369 (SCA) at para 38.

signed the separation agreements presented to them by Panman on 23 March 2018.

- [27] Dealing first with the Court's credibility findings, the primary basis on which the Labour Court rejected the appellant's version appears to relate first to the finding that Panman's version was inconsistent with paragraph 1.5 of the pre-trial minutes, and secondly, to the CCMA's ruling on jurisdiction, to the extent that it incorporates a statement attributed to Maolusi.
- [28] The pre-trial minutes' state that in respect of events on 23 March 2018, the employees' version is recorded as "*Not a meeting – just an instruction to leave*". The appellant's version is recorded as "*Consultation was conducted prior to the signature of the separation agreements*". To the extent that the Court found that Panman's evidence contradicted the pre-trial minutes because he had given evidence of two meetings whereas the pre-trial minutes mentioned only one, there is no contradiction. Panman's evidence was that on 19 March 2018, he distributed the *pro forma* agreements and requested employees to consider them and return on 23 March 2018, when he again met with employees on site. Although the word "consultation" was used by Maolusi and Panman to describe the discussions held with affected employees at the Rema Tip Top site on 19 and 23 March 2018, in neither case was the reference to a "consultation" for the purposes of section 189 – it was common cause that a formal section 189 process was never commenced. The appellant's case was and has always been that on account of the signature of the separation agreements, it was not necessary to initiate a consultation process.
- [29] In so far as Moalusi is recorded in the CCMA's jurisdiction ruling as having stated that the employees "*were part of 30 other employees who went through a s189 dismissal at Rema Tip Top...*" the ruling ought to be viewed in its context. The employees had referred a dispute to the CCMA in which they alleged that they had been unfairly dismissed. The context in which the employees' employment

was terminated was the closure by the appellant's client on the site on which the employees had been placed. The employees' claim (as reflected in the statement of claim) was clearly one of unfair retrenchment. There is thus nothing sinister in Maolusi's statement relating as it does to the reason for dismissal, the basis on which jurisdiction is determined in an unfair dismissal claim. The statement is certainly not a basis to find that Maolusi was a dishonest witness, particularly in circumstances where the basis for this finding was never put to Maolusi when he testified so as to afford him the opportunity to respond to what the Court clearly regarded as dishonest conduct.

[30] The Labour Court's records that the employees' evidence is more credible since their version was consistent in relation to events on 23 March 2023 "*as that no consultation having taken place in respect of the Rema branch closing down and having to attend at the Benoni branch to collect documents, which turned out to be their confirmation of employment letters*" and that therefore, no separation agreements were signed. The Court continues: "*Had they signed the agreements, there would be no reason for them to attend at the respondent's office to be reassigned*".

[31] What this conclusion ignores is that both employees testified that on Friday 23 March 2023, they were told by Panman that the client Rema Tip Top had changed its working systems, that they were no longer needed on the premises and should hand in their boots and overalls, and that they should go to Benoni the next Monday. This part of the employees' evidence is entirely consistent with that given by Panman. What was also not disputed was that Panman had met with both employees on 23 March 2018 and that the employees were advised to report at the Benoni branch the next Monday. Panman's evidence was clear – the purpose of reporting to the Benoni branch after the signature of the separation agreements was to explore the prospects of placement on an alternative site. There is thus no contradiction or inconsistency in the evidence given by the appellant's witnesses. The signature of the separation agreements

at the meeting arranged for 23 March 2018 on the client's site was entirely consistent with the request that employees attend at the appellant Benoni branch where placement with other clients would be explored.

[32] In my view, there was thus no basis for the Court to conclude that the appellant's witnesses were not credible. In particular, there was no basis on the evidence to find that Panman was a dishonest witness, a finding that is wholly without substance.

[33] Further, the Labour Court erred by drawing conclusions based solely on its credibility findings, without any consideration of the underlying probabilities. The Court failed to engage with the circumstances surrounding the events of 23 March 2018. Panman's evidence, it will be recalled, was that after distributing the agreements on 19 March 2018, he met with each individual employee on site on 23 March 2018 and explained and discussed the content of the agreement with each. He testified that he signed each agreement on behalf of the employer and that each employee who signed the agreement did so in the space provided, in his presence. It was common cause that in respect of some employees, Identity Document (ID) numbers had been inserted on the *pro forma* agreement, but not in all cases, and that no witnesses had signed the agreements despite the provision on the *pro forma* document for signature by two witnesses. Panman explained that he did not wish to have the appellant's employees acting as witnesses to each other's agreements; there was a sensitivity around wage rates that were reflected in the agreements.

[34] On the other hand, the employees' version was a bare denial. The first respondent was shown the disputed document by his representative and denied that the signature appearing on the document was his. He also testified that his surname was not correctly reflected on the document that he was shown. This assertion was made to substantiate the claim that the first respondent had not seen the document nor signed it. However, under cross-examination, the first

respondent could not explain why in the affidavit to which he deposed more than four years later, his name is recorded in terms identical to those that appear on the separation agreement.

[35] In the agreement alleged to have been signed by the first respondent, an ID number had been inserted into the agreement below his name in handwriting and then scratched out. The proposition put to the first respondent under cross-examination was that the reason the ID number had been scratched out was that it was not his and that he had scratched it out because he knew that it was not his ID number. His response was that *“they cropped some other person’s signature”*.

[36] Further, the persistence by the employees’ representative (to the point of the appeal hearing) that the separation agreements were invalid for lack of full names, ID numbers and witnesses, is inconsistent with the version that the employees had never seen the agreements, never signed them and that they were a fabrication produced after the event to defend a claim of an unfair retrenchment.

[37] What the Court ignored in its assessment of the probabilities of the competing versions before it includes the fact that there were five signature samples that served before the Court, none of which were interrogated. The evidence by both Moalusi and Panman, during cross-examination, was that the signatures looked “the same”. These observations were not seriously challenged by the employees’ representative. The Court was required in the circumstances to have engaged in a comparison of the signatures of the employees on the documents that were before the Court. The Court’s failure to do so was a misdirection, and its conclusion that the separation agreements were fabricated was flawed.

[38] In so far as the Labour Court attached weight to the confirmation of employment letters dated 12 April 2018 in its assessment of the probabilities of the parties’

respective versions, the Court's finding is misplaced. First, the letters state that the employees' contracts were terminated on 25 March 2018 (and not 25 April 2018, as per the Court records). Further, it was never in dispute that the employees had been advised on 23 March 2018 that the Rema site was closing and that they should hand in their uniforms and boots. The conclusion "*In my view, if mutual separation agreements were concluded on 23 April 2018 with this date being the last date of service as recorded in the agreement then the letter of confirmation would have stated that the contract terminated on 23 April 2018*" is thus entirely disconnected from the evidence.

[39] Finally, Panman testified that all of the employees with whom he met on 23 March agreed to the terms of the mutual separation agreement. Twenty-two signed agreements (including the agreements signed by the employees) were before the Court. There was no evidence to call into question any of the other agreements or to suggest why Panman would have fabricated agreements only in respect of the first and second respondents.

[40] In summary: in its assessment of the conflicting versions regarding the signature of the separation agreements, the Labour Court conflated considerations of credibility and probability. Its credibility analysis was in any event flawed – there is no basis on the evidence to have concluded that the testimony of Moalusi and Panman was inconsistent and contradictory; there was certainly no basis to find that Panman was a dishonest witness. In their evidence, the employees had proffered only what amounted to bare denials that they had signed the separation agreements. The probabilities, properly assessed, indicate that the employees were present on site on 23 March 2018, as was Panman. Further, amendments to the separation agreement that the appellant alleges was signed by the first respondent indicate that an ID number inserted into the *pro forma* was deleted and initialed by the employee signatory to the agreement – an indication that the deletion was affected by the first respondent on the basis that the ID number recorded was incorrect. To the extent that the first respondent challenged the

document presented to him on the basis that it did not contain his full name, he could not explain why in an affidavit deposed to some four years later his name is reflected in identical terms. Both the appellant's witnesses testified as to the similarity in the employees' signatures in the disputed document, the pre-trial minutes, the affidavit later signed by the employees and their contracts of employment. None of this evidence was disputed by the employees' representative, nor did the Court engage in a comparative assessment or analysis of the disputed signatures. The probabilities thus favour the appellant's version that the separation agreements were presented to the employees and signed by them. It does not assist the employees, as their representative attempted to do, to contend that the agreements were invalid for want of witnesses, identity numbers or other formality. The only issue for decision in terms of the pleadings and the pre-trial minutes was whether the employees had signed the agreements on which the appellant relied.

[41] The employees' attack on the separation agreements was limited to a denial of their signatures on the respective documents. They did not dispute that the terms of the agreements record the fact of a mutually agreed termination of employment on the stipulated terms, or raise any other basis for calling the content of the document into question. The agreements unequivocally provide for a mutually agreed termination of employment. That being so, there was no dismissal for the purposes of section 186 (1) of the LRA.

[42] The Labour Court erred in finding that the employees had been dismissed and that their dismissal was unfair. The appeal thus stands to be upheld.

[43] I make the following order:

Order

1. The appeal is upheld.

2. The order of the Labour Court is set aside and substituted by the following:

‘The referral is dismissed.’

3. There is no order as to costs.

Van Niekerk JA

Molahlehi AJP *et* Savage ADJP concur.

APPEARANCES:

FOR THE APPELLANT:

Ms W Isaaks

Instructed by Hunts (Inc Borkums) Attorneys

FOR THE RESPONDENTS:

Mr Marweshe, Marweshe Attorneys